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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 161

CITY OF FORT LAUDERDALE,
Petitioner,

vs.

D. D. FREEMAN, as Trustee in Bankruptcy for Bahia Mar Corporation, a Florida corporation, Bankrupt,
Respondent.

IN THE MATTER OF BAHIA MAR CORPORATION, BANKRUPT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE MATTER OF BAHIA MAR CORPORATION, BANKRUPT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The City of Fort Lauderdale, a municipal corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 6, 1956.

Citations to Opinions Below.

(a) The opinion of the Court of Appeals in the first appeal was rendered on December 14, 1954, and is reported in 217 Fed. 2. 600. A copy thereof is printed in Appendix A, *infra.*

(b) The post-mandate order of the United States District Court filed September 7, 1955, is unreported. It

appears in the printed record in Case No. 15,845[1], page 86. A copy is printed in Appendix B, *infra*.

(c) The opinion of the Court of Appeals in the second appeal rendered April 6, 1956, is reported in 230 Fed. 2. 948, and is a mere sentence,

"The judgment of the trial court is affirmed."

Jurisdiction.

The judgment of the Court of Appeals now sought to be reviewed was entered on April 6, 1956 (230 Fed. 2. 948).

Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

First Question.

Under the doctrine of "Law of the Case", where in a bankruptcy case there are successive appeals to the same United States Court of Appeals and the first appeal results in a decree of reversal (217 Fed. 2. 600) (and the appellee's petition for rehearing is denied) and thereafter upon a petition to enforce the mandate in the District Court, there being no change in the law or facts, the District Court ignores the mandate and overrules the decision of the Court of Appeals on the first appeal, does the action of

[1] The printed record in the Court of Appeals consists of the following:

No. 13,927, filed February 25, 1952, two volumes.
In this case the appeal was dismissed for want of appealable order, without determination of any issues, 197 Fed. 2. 122.

No. 14,757, filed March 17, 1954, two volumes, resulting in the decision reported 217 Fed. 2. 600, herein called the first appeal.

No. 15,845, filed December 6, 1955, one volume, resulting in the decision reported 230 Fed. 2. 948, herein called the second appeal.

Reference herein to the printed record will be by case number and page.

the same Court of Appeals on the second appeal (the panel consisting of different judges than the panel which heard the case on the first appeal) (230 Fed. 2. 948) in sanctioning and affirming such postmandate overruling by the District Court of its former decision depart from the accepted and usual course of judicial proceedings to the extent of depriving the successful litigant in the first appeal of property without due process of law.

Second Question.

In a bankruptcy case where the only prebankruptcy assets of the bankrupt were rights as lessee under a 20-year lease, together with its personal property situated on the leased premises which was (by express provision in the lease) subject to a contract lien for rent (of the status of a chattel mortgage), which lease was forfeited and terminated by the landlord before bankruptcy by reason of the lessee's default and hence constituted an *EXPIRED* lease and not an unexpired lease and prebankruptcy proceedings were instituted by the landlord in state court to foreclose such lien and regain possession and thereafter the bankruptcy court adjudicated the lessee a bankrupt, appointed a trustee who without consent of the landlord continued to possess and operate the leased premises for over a year after such termination of lease and enjoined the prosecution of the state court proceedings, does the bankruptcy court have the power or authority to administer the revenue derived from such operation of the leased premises under an *EXPIRED* lease as unencumbered assets of the bankrupt and is the landlord's *CONTRACT LIEN* on the physical assets restricted to *three* months prebankruptcy rent under the provisions of Sections 63(a)(1)(4)(9), 64(a)(5) and 67(c) of the Chandler Act, and the landlord's claim reduced to an unsecured claim and if such interpreta-

tion is warranted by said sections of the Chandler Act, does the same comport with the Due Process Clause of the Fifth Amendment?

Constitution and Statutes Involved.

(a) Constitution. The Due Process of Law Clause of the Fifth Amendment.

(b) Pertinent provisions of three sections of the Chandler Act.

The three pertinent provisions of the Chandler Act which need to be noticed are:

Section 63(a)(1)(4)(9)—(11 U. S. C. 103(a)(1)(4)(9))

Section 64(a)(5)—(11 U. S. C. 104(a)(5))

Section 67(c)—(11 U. S. C. 107(c))

They are printed in Appendix C, *infra*.

Statement.

After World War II the City of Fort Lauderdale, herein called the City, with borrowed money obtained a conveyance from the Federal Government of a strip of land situated on the Atlantic Ocean (about one-half mile long) and extending to the Intracoastal Waterway. This property had been used by the Federal Government as its Coast Guard Base 6.

On September 22, 1948, the City entered into a "three-part package project"[1] with Universal Construction Company, herein called Universal, whereby the City would issue $2,500,000 of Recreation Revenue Bonds and Universal

[1] There are three decisions of the Supreme Court of Florida which give the history of this project, together with a determination of certain vital issues. The quoted language is taken from the last of these three decisions: *Schmeller* vs. *City of Fort Lauderdale*, 38 So. 2. 36, Decided December 21, 1948; *R. H. Gore, et al* vs. *Universal Construction Company, Bahia Mar Corporation, City of Fort Lauderale*, 51 So. 2. 429, decided December 8, 1950, rehearing denied April 7, 1951; *Universal Construction Company* vs. *City of Fort Lauderdale*, 68 So. 2. 366, decided October 30, 1953.

would purchase the same for not less than 97.5. The proceeds of the sale of the bonds were to be used for the following purposes: First, to repay the City's loan of $627,000 paid to the Federal Government in acquiring title to Coast Guard Base 6; second, for payment of interest on the bonds for one year ($100,000); and third, the balance to pay the cost of constructing a municipal yacht basin with facilities which became known as "Bahia Mar". The primary security for these bonds was rent agreed to be paid by Universal under a 20-year lease in the amount of $160,000 per year in advance. The construction contract between the City and Universal bearing date September 22, 1948, was executed (R. 13927, pp. 216-264). The 20-year lease between the City and Universal was executed September 22, 1948 (R. 13927, pp. 14-33 and 264). Paragraph 19 of this lease (R. 13927, pp. 28, 29) contained provisions for the termination of the lease in the event of lessee's default. In Paragraph 20 of the lease (R. 13927, pp. 29, 30) the lessee granted to the City as landlord a first contract lien on all the property of the lessee situated on the leased premises. During the course of the construction of the improvements Universal, as original lessee, on September 15, 1949, assigned its leasehold estate to Bahia Mar Corporation, a Florida corporation. A copy of this assignment appears in the Record #14,757, page 113. Bahia Mar Corporation had substantially the same stockholders, officers and directors as Universal (R. 14757, p. 98). Bahia Mar Corporation, as assignee of the lease, is the Bankrupt in this case and is herein referred to as lessee. The lessee took possession of the leased premises on December 1, 1949, and devoted the same to commercial gain. It did not pay rent. Litigation was brought in the state court which not only fixed December 1, 1949, as the beginning of the lease, but also obtained for the City rent for the first year through the

process of appropriating the retainage under the construction contract.

> *Gore et al* vs. *Universal Construction Company, Bahia Mar Corporation, City of Fort Lauderdale,* 51 So. 2. 429.

Rent for the second year in the amount of $160,000 matured December 1, 1950. It was not paid. The demand required by Paragraph 19 of the lease was issued and served by the City on December 13, 1950 (R. 13927, p. 265). The lessee did not cure such default during the 90-day period prescribed by Paragraph 19 of the lease. This 90-day period expired on March 13, 1951. These facts were adjudicated by the Court of Appeals in the first appeal, 217 Fed. 2. 600. During the 90-day grace period between December 13, 1950, and March 13, 1951, the successful plaintiffs in the state court on January 26, 1951, initiated proceedings for the prevention of diversion of revenues and for the cancellation of the lease in the event rent was not paid by March 13, 1951, and for the foreclosure of the landlord's contract lien granted by Paragraph 20 of the lease. (R. 13927, pp. 309-350—Transcript of state court proceedings.)

On the day following the expiration of the aforesaid grace period, to-wit: March 14, 1951, the lessee filed arrangement proceedings under Chapter XI of the Chandler Act. (R. 13927, p. 5, *et seq.*) The lessee did not file its schedule until April 2, 1951 (R. 13,927, pp. 34-61). In this schedule the lessee listed the City as having a *SECURED* claim in the amount of $160,000, but stated that the question of validity of this claim was still before the state court. The lessee had filed a petition for rehearing in the Supreme Court of Florida, which was not denied until April 7, 1951 (51 So. 2. 429). The lessee was late in filing its plan of arrangement. It obtained two extensions

of time. In its first application for extension of time on May 18, 1951, it averred under oath,

> "* * * the said City being the largest creditor having a secured claim for rent in the sum of $160,000" (R. 13927, pp. 125, 126).

The City by appropriate action on May 1, 1951, and then again on June 19, 1951, cancelled the lease because of the lessee's failure to pay rent which was due December 1, 1950. This fact was recognized by the Court of Appeals (217 Fed. 2. 600). On August 8, 1951, the City filed its petition in the Bankruptcy Court objecting to the plan of arrangement and asserting that the lease was an "*expired lease*" and hence no asset of the bankrupt, and sought an order requiring the surrender of possession to the City. The City also sought to vacate the restraining order issued by the Bankruptcy Court enjoining the further prosecution of the state court proceedings (R. 13927, p. 134 *et seq.*). On August 7, 1951, the Referee by order rejected the proposed plan of arrangement because of want of the City's consent (R. 13927, p. 369). Thereafter on September 6, 1951, the lessee gave its consent to the adjudication in bankruptcy (p. 376) and such adjudication was made on September 7, 1951, by the Referee (p. 378). On September 20, 1951, the Referee appointed D. D. Freeman Trustee (R. 13927, p. 421). Although the lease was terminated on May 1, 1951, the Trustee nevertheless on October 29, 1951, urged the Referee to allow him to operate the leased premises although disclaiming the obligations of the lease (R. 13927, p. 451). On November 21, 1951, the Referee authorized the Trustee to operate the leased premises even though the lease was an expired lease (it had been terminated and cancelled more than six months before—see 217 Fed. 2. 600), and a rejected lease (R. 13927, p. 553). On June 11, 1952, the Referee directed the Trustee to return the leased

premises to the City on June 14, 1952. This also authorized the sale of all the physical assets of the lessee situated on the leased premises for the sum of $100,000 to the City, the purchase price to be applied on the statutory and contract lien for rent of the City. (R. 14757, pp. 30, 31.) On June 14, 1952, the Trustee surrendered to the City possession of portions of the leased premises and relegated the City to actions in the state court to recover possession of the major revenue producing facilities. It was not until December 29, 1952, that the City acquired possession of the entire leased premises (City's Exhibits 100, 101, R. 15845, pp. 53, 60, 94, 95, 110).[1]

On June 4, 1953, the Referee entered his order as to the amount of money the City should receive as rent. (R. 14757, p. 508.) Being aggrieved, the City sought a review before the District Judge. The District Judge on July 30, 1953, affirmed (R. 14757, p. 528). On appeal to the United States Court of Appeals for the Fifth Circuit, a judgment of reversal was entered (217 Fed. 2. 600) (see App. A, *infra*). The panel of the Court rendering said decision consisted of Justices Holmes, Borah and Russell. In that decision the Court of Appeals held that by reason of the fact that the lease was an expired lease and had been terminated on May 1, 1951, it constituted no assets of the bankrupt, and that all revenues derived from the operation of the leased premises while the Trustee was in charge were owned by the City and could not be used for the payment of administration costs of the bankrupt. The Court of Appeals also adjudicated that *"in addition"* to the City's ownership of said revenues the City was entitled to be paid by the Trustee $128,000 which more than absorbed the $100,000 paid by the City for the physical assets of the bankrupt.

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[1] See *Bahia Mar Caterers, Inc.*, vs. *City of Fort Lauderdale*, 85 So. 2. 591.

The Trustee filed a petition for rehearing contending that the said decision amounted to allowing the City double payment of rent. The petition for rehearing was denied March 29, 1955 (R. 14757, p. 631 *et seq.* and p. 645).

While the case was pending for review in the Court of Appeals, the Trustee on November 10, 1952, filed his final report (R. 14757, p. 270, *et seq.*). In this report he showed that he had cash on hand in the amount of $102,939.39, which was the net proceeds after paying cost of operations, including other disbursements, the validity of which was challenged by the City. While the case was pending in the Court of Appeals the Trustee paid out of said funds $45,028.57 as administration costs (R. 15845, pp. 12, 13). After the coming down of the mandate consequent upon 217 Fed. 2. 600, the City filed its petition for the enforcement of the mandate (R. 15845, p. 31). The order of the Referee was entered on June 13, 1955 (R. 15845, p. 61) which was changed by the judgment of the District Court dated September 1, 1955, and filed September 7, 1955 (see App. B, *infra*) (R. 15845, p. 86). The District Court held that the Court of Appeals in its decision (217 Fed. 2. 600) had erred in allowing the City both ownership of the revenues in addition to the $128,000. The District Judge held that the City was entitled to only $128,000 and that as to the balance of the City's claim for rent it was a mere unsecured creditor. The District Judge also refused to require restitution of the sum of $45,028.57 which the Trustee during said appeal out of the funds owned by the City (such ownership was adjudicated by the Court of Appeals, 217 Fed. 2. 600) had paid for administration expenses. The District Court also authorized further payment of $4,389.48 for administration expenses out of said funds owned by the City. The District Judge refused to require the Trustee to make any accounting to the City of the revenues derived from the leased premises after the

cancellation of the lease (May 1, 1951), and while the Trustee deprived the City of possession of said premises, although the Court of Appeals had determined that these revennes were owned by the City.

On appeal to the Court of Appeals that Court on April 6, 1956, rendered a *per curiam* one sentence decision,

> "Judgment of the trial court is affirmed".
> 230 Fed. 2. 948.

The panel of the Court hearing the case on the second appeal was Justices Tuttle, Cameron and Jones, none of whom had heard the case on the first appeal.

So it is that, although the Court of Appeals on the first appeal (217 Fed. 2. 600) determined that the City (and not the bankrupt) was the owner of all the revenues derived from the leased premises from the date of the cancellation of the lease on May 1, 1951, for the period it was deprived of possession, and in addition was entitled to be paid $128,000 which was to be applied on the rent in the amount of $160,000 due December 1, 1950 (10½ months before the appointment of the Trustee), yet, notwithstanding this, the District Judge in carrying into effect said decision disallowed the right of the City to receive the revenues thus owned by it, and allowed the City only $128,000 and reduced the City's remaining claim to that of an unsecured creditor and wiped out the City's contractual lien of the status of a chattel mortgage. Such order of the District Court was on the second appeal affirmed without explanation or justification. The Court of Appeals on the second appeal did not even take notice of its decision on the first appeal.

Reasons for Granting the Writ.

I.

The decision of the Court of Appeals for the Fifth Circuit in the second appeal (230 Fed. 2. 948) sanctioned and

affirmed the order of the District Judge (App. B, *infra*) in reversing the decision of the said Court of Appeals in the First appeal (217 Fed. 2. 600) (App. A, *infra*). There had been no change in the facts or the law between the first and second appeals. The District Judge based his reversal on grounds asserted in the Trustee's petition for rehearing addressed to the decision of the Court of Appeals on the first appeal, even though said petition for rehearing was denied (Order of denial entered March 29, 1955, R. 14757, p. 645). The fact that the panel of the Court of Appeals hearing the second appeal consisting of three Judges who did not hear the first appeal is no justification for such scuttling of the well established principle of judicial review known as "Law of the Case". Such action of the Court of Appeals on the second appeal constitutes a flagrant departure from established principles of judicial review which is as old as the nation itself. Such action of the Court of Appeals on the second appeal deprives the City of property adjudicated by the judgment rendered in the first appeal which had become unassailable. Such contradictory action of the Court of Appeals in the same case on successive appeals presents an important question of judicial review and is in direct conflict with a great number of the decisions of this Court, citing only the two early and leading cases. *Wayne County* vs. *Kennicott*, 94 U. S. 498, 24 L. Ed. 260, Decided 1877, citing with approval eight early cases of this Court on this question; *Thompson* vs. *Maxwell*, 168 U. S. 451, 18 S. Ct. 121, 42 L. Ed. 539, Decided in 1897. In the latter case the Court began its decision with the following:

> "It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal

or writ of error brought in the same suit. The first decision has become the settled law of the case."

42 L. Ed. at 541.

Such contradictory decision of the Court of Appeals in the same case is in conflict with prior decisions of the same Court of Appeals. In re N. V. Zuid-Hollandsche Scheepvaart Mattschappij of Rotterdam, 64 Fed. 2. 915; In re United States, 207 Fed. 2. 567 (CA 5). Such contradictory decisions of the same court in the same case are also in conflict with the decsions of every United States Court of Appeals[1].

II.

This case presents important principles of law in the administration of the estate of a bankrupt under the Bankruptcy Act of 1938, known as the Chandler Act.[2]

The Second Question, *supra*, outlines in general these questions. They have not yet been resolved by this Court.

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[1] The numerous decisions on this subject are collected in the American Digest, Appal & Error, Key 1097, *et seq.*, Courts, Key 88 to 99. Other cases of this Court dealing with this question are collected in Volume 2 U. S. Supreme Court Digest, Appeal and Error, Sec. 1766, p. 94, *et seq.*, published in 1948 by the Lawyers Cooperative Publishing Company.

[2] During and since the October 1948 Term, this Court has entertained jurisdiction to decide important principles of law under the Bankruptcy Act in the following cases:

Goggin vs. *Division of Labor of Calif.*, 336 U. S. 118, 69 S. Ct. 469, 93 L.Ed. 543, Reversing 165 Fed. 2. 155 (CA 9); *New York* vs. *Saper*, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710, Affirming 168 Fed. 2. 268, 272, (CA 2); *Manufacturers Trust Co.* vs. *Becker*, 338 U. S. 304, 70 S. Ct. 127, 94 L. Ed. 107, Affirming 173 Fed. 2. 944 (CA 2); *Mosser* vs. *Darrow*, 341 U. S. 267 71 S. Ct. 680, 95 L. Ed. 927, Reversing 184 Fed. 2. 1 (CA 7); *Nathanson* vs. *National Labor Relations Board*, 344 U. S. 25, 73 S. Ct. 80, 97 L. Ed. 23, Reversing 194 Fed.2. 248 (CA 1); *City of New York* vs. *New York, New Haven & Hartford R. Co.*, 344 U. S. 293, 73 S. Ct. 299, 97 L. Ed. 333, Reversing 197 Fed. 2. 428 (CA 2); *St. Joe Paper Co.* vs. *A. C. L. Rwy., In re Fla. East Coast Rwy.*, 347 U. S. 298, 74 S. Ct. 574, 98 L. Ed. 710, Reversing 20 Fed. 2. 325, (CA 5 Fla.); *Jaffke* vs. *Dunham* as Trustee, No. 845, Certiorari granted May 28, 1956 (24 LW 3317, 3319) to 229 Fed. 2. 232 (CA 7).

There is conflict between the decision of the Court of Appeals of the Fifth Circuit and the second appeal and Courts of Appeal of other Circuits, all of which will be more fully delineated in the next paragraph. These questions relate to the rights of a landlord under a lease which was terminated and forfeited by reason of tenant's default, and hence an "Expired Lease" many months before adjudication in bankruptcy and appointment of trustee, to the revenues derived from the leased premises after the expiration of the lease and while the same was in the possession of the Bankruptcy Court, together with the rights of the landlord under a contractual lien for rent which was in process of foreclosure in the state court prior to the institution of bankruptcy proceedings.

III.

The decision of the court below on the second appeal is erroneous, in contradiction of its decision in the first appeal, and in conflict with the decisions of this Court and other Courts of Appeals on vital problems involved in the administration of an estate by a Court of Bankruptcy and the construction and interpretation of

Section 63(a)(1)(4)(9)—(11 U. S. C. 103(a)(1)(4)(9))
Section 64(a)(5)—(11 U. S. C. 104(a)(5))
Section 67(c)—(11 U. S. C. 107(c))

These questions, *inter alia*, include the following:

(A) Section 63(a)(1)(4) and (9) of the Chandler Act (see App. C, *infra*). This section is limited to the problem, "Debts which may be proved". These three subsections of Section 63 prescribe the amount of a debt which a landlord may prove, as follows:

(1) Prebankruptcy rent actually due and owing before bankruptcy, together with interest (subsections (1) and

(4)). Applying this to the claim of the City it had a provable debt in the amount of $160,000 which became absolutely due and owing on December 1, 1950, prior to bankruptcy, together with interest thereon to bankruptcy.

(2) Rent accruing to the date the leased premises were surrendered to the landlord. Subsection (9) carries the express language,

> "*PLUS* an amount equal to the unpaid rent accrued without acceleration up to such date." (The date of surrender of the premises to the landlord and the landlord's re-entry.)

The City did not obtain possession of the leased premises until December 29, 1952. Therefore two further annual installments of rent had accrued besides the prebankruptcy debt, to-wit: December 1, 1951, $160,000, and December 1, 1952, $160,000.

(3) Future rent limited to rent for one year after the landlord's re-entry (Subsection (9)).

Subsection (9) of Section 63 appeared for the first time in the Bankruptcy Act of 1934.[1] In the treatment of the City's claim the Court below misconstrued the said provisions of Section 63 of the Chandler Act, and its said decision is in conflict with the decisions of the Second, Eighth and Tenth Circuits. *Olden* vs. *Tonto Realty Corp.* (CA 2nd), 143 Fed. 2. 916, Decided May, 1944; *Ten-Six Olive, Inc.* vs. *Curby,* 208 Fed. 2. 117 (CA 8), Decided November 2, 1953; *Whiteside as Trustee* vs. *Rocky Mt. Fuel Co.,* 101 Fed. 2. 765 (CCA 10th), Cert. Den. 307 U. S. 640, 59 S. Ct.

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[1] The following decisions of this Court give the background and reasons for this inclusion:

Manhattan Properties, Inc. vs. *Irving Trust Company,* 291 U. S. 320, 54 S. Ct. 385, 78 L. Ed. 824, Affirming CCA 2nd, Decided 1934; *City Bank Farmers Trust Co.* vs. *Irving Trust Company,* 299 U. S. 433, 57 S. Ct. 292, 81 L. Ed. 324 (with note at 333), Reversing CCA 2nd, decided 1937; *Kuehner* vs. *Irving Trust Company,* 299 U. S. 445, 57 S. Ct. 298, 81 L. Ed. 340, Affirming CCA 2nd, Decided 1937.

1038, 83 L. Ed. 1521; and is also in conflict with the decisions of this Court, *Palmer* vs. *Conn. Rwy. & Light Co.*, 311 U. S. 544, 61 S. Ct. 379, 85 L. Ed. 336; *Callaway as Trustee of Central of Georgia Railway* vs. *Benton*, 336 U. S. 132, 69 S. Ct. 435, 93 L. Ed. 553 (1949), Affirming 165 Fed. 2. 877 (CA 5, Ga.)[1]

Thus it is that there was due and absolutely owing the City as rent $160,000 on December 1, 1950, which was a provable claim under subsections (a)(1) and (4) of Section 63. The arrangement proceedings were instituted on March 14, 1951, and it was not until September 7, 1951, that the debtor was adjudicated a bankrupt, and on September 20, 1951, a trustee was appointed. On May 1, 1951, the lease was effectively cancelled and forfeited. This was long before the adjudication and the appointment of a trustee. Notwithstanding this the City as landlord did not re-acquire possession of the leased premises until December 29, 1952. The cancellation of the lease did not terminate the obligation to pay rent, for under the express provisions of Section 63, subsection (a)(9), the landlord had a provable claim for rent to the date the landlord re-acquired possession of the leased premises, together with a claim for future rent.

The Court of Appeals in the second appeal authorized the District Court to scale down the City's claim as landlord to $128,000 (consisting of two items, $40,000 as prebankruptcy rent for three months, and $88,000 "use and occupancy" [2] during the Trustee's operation). This treat-

[1] Anotation, "Provability of Claims by Lessor under Bankruptcy Act Since Amendments of 1934 and 1938", 129 A. L. R. 701 to 724 (1940).

[2] The Doctrine of "Use and Occupancy" became obsolete with the enactment of the 1934 Amendment which, slightly revised, became Section 63(a)(9) of the Chandler Act. Its only application now, if at all, relates to the 60-day period of indecision prescribed by Section 70(b) of the Chandler Act, which applies only to *unexpired* leases.

ment of the landlord's claim is in violation of the express provisions of Section 63 and in conflict with the foregoing decisions.

(B) Section 64(a)(5) (App. C, *infra*). This section of the Bankruptcy Act is entitled, "Debts Which Have Priority". Its opening sentence prescribes the limitation as follows:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * *, '* * *' (5) debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: Provided, however, that such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy."

The above language first appeared in the Chandler Act. It is a *priority statute and has no application to secured claims or debts secured by a seasoned lien.* The lower court treated this statute as applicable to the claim of the City even though it was a secured claim. It must be remembered that the City as landlord had a contract lien on all the assets of the bankrupt lessee (see Paragraph 20 of the lease, R. 13927, pp. 29, 30). The nature and status of this lien is governed by state law. Under the laws of the State of Florida such contractual lien occupies the status of a chattel mortgage. *Richardson* vs. *Myers*, 106 Fla. 136, 143 So. 157. The City purchased all the assets of the bankrupt lessee for the sum of $100,000 in pursuance of the order of the Court bearing date June 11, 1952 (R. 14757, pp. 30, 31). This order specifically adjudicated the following:

> "It Is Further Ordered that the City of Fort Lauderdale has a statutory and contract lien for rent on the property described in the Trustee's inventory, and that by reason thereof the purchase price of $100,000 shall be credited on the aforesaid lien for rent."

The decision of the Court of Appeals construed Section 64(a)(5) to apply to the claim of a landlord which constitutes a secured claim. Section 64 has always been treated as a priority statute having no effect upon secured claims. That there is a distinction between a priority claim and a secured claim, even under the Chandler Act, is demonstrated by the current official forms in bankruptcy adopted by this Court. Form No. 1 is the debtor's petition in bankruptcy. To that petition there is attached a schedule of debts and assets. Schedule A-1 is entitled "Statement of all creditors to whom priority is secured by the act." Schedule A-2 is entitled "Creditors holding securities."[1] Schedule A-3 is entitled "Creditors whose claims are unsecured." This form was used by the bankrupt in the instant case. There are other provisions of the Chandler Act which clearly demonstrate the distinction between priority claims and secured claims, such as Sections 57(e) and 65(a). The distinction between the priority claim and a secured claim under Section 64 is elaborately considered in the leading texts. Vol. 3, *Collier on Bankruptcy*, 14th Ed. (Loose Leaf), Section 64, p. 2041, *et seq.; Remington on Bankruptcy*, 5th Ed., Vol. 4, pp. 476, 477, Vol. 4-A, p. 416.

The decision of the Court of Appeals is in conflict with prior decisions of the same Court. *Martin* vs. *Orgain*, 174 Fed. 772, (CCA 5, Tex.), 1909, Cert. Den. 216 U. S. 619, 30 S. Ct. 574, 54 L. Ed. 640; *In re* Brannon, *City of Dallas* vs.

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[1] The claim of the City was listed by the bankrupt in Schedule A-2 as a secured claim and not as a priority claim (R. 13,927, p. 35, 36). (See also sworn statement of bankrupt filed May 18, 1951, R. 13,927, p. 125, 126, quoted on page 7, *supra.*)

Ryan, 62 Fed. 2. 959 (CCA 5, Tex.), 1933, Reversing 53 Fed. 2. 401, Cert. Den. 289 U. S. 742, 53 S. Ct. 692, 77 L. Ed. 1489; *In re* Dublin Veneer Co., 1 Fed. Supp. 313, 68 Fed. 2. 364 (CCA 5, Ga.) Cert. Den. 292 U. S. 645, 54 S. Ct. 779, 78 L. Ed. 1496; *Reese* vs. *United States*, 75 Fed. 2. 9 (CCA 5, Fla.) 1935; *City of Dallas* vs. *Crippen*, 171 Fed. 2. 526 (CA 5, Tex.), 1948, Reversing 78 Fed. Supp. 481; *Brans* vs. *City of Dallas*, 217 Fed. 2. 640,[1] decided December 22, 1954, (8 days after decision on 1st appeal, 217 Fed. 2. 600). Such decision of the lower court is in conflict with decisions of other Circuits. *Strom* vs. *Peikes*, 123 Fed. 2. 1003, 138 A. L. R. 937 (CCA 2) 1941; *Delaney* vs. *City and County of Denver*, 185 Fed. 2. 246 (CA 10, Colo.) 1950. Such decision of the lower Court is in conflict with decisions of this Court. *In re Burns, Henderson* vs. *Mayer*, 225 U. S. 631, 32 S. Ct. 699, 56 L. Ed. 1233 (1912); *Richmond* vs. *Bird*, 249 U. S. 174, 39 S. Ct. 186, 63 L. Ed. 543 (1919), Affirming 240 Fed. 545 (CCA 4, Va.).

It must also be remembered that the City's landlord lien was in process of foreclosure in the state court long prior to the initiation of the arrangement proceedings in the Bankruptcy Court, and hence deprivation of the City's right to exhaust such proceedings was in conflict with the decisions. *Atlanta Flooring & Insulation Co.* vs. *Russell* (1944, CCA 5, Ga.), 145 Fed. 2. 493, rehearing denied 1945, 146 Fed. 2. 884, Cert. Den. 325 U. S. 862, 65 S. Ct. 1202, 89 L. Ed. 1983; *Callaway as Trustee of Central of Georgia Railway* vs. *Benton* (1949), CCA 5, Ga.), 336 U. S. 132, 69 S. Ct. 435, 93 L. Ed. 553, affirming 165 Fed. 2. 877. See also the 1955 annotation in 40 A. L. R. 2. 663, "Bankruptcy Court's injunction against mortgage or lien enforcement

[1] The authorities relied on in this case were the earlier decisions of said court listed in this paragraph. One year before, the same court in *Rochelle* vs. *McLendon*, 208 Fed. 2. 442, said that the above early cases were decided before the Chandler Act, and hence valueless as authority.

proceedings commenced, before bankruptcy, in another court".

(C) Section 67(c) (App. C, *infra*). This section of the Bankruptcy Act is entitled "Liens and Fraudulent Transfers". We need to notice Paragraph (c) of this section.

> "c. Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this Act, though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, * * *."

The above language first appeared in the Chandler Act. The Court of Appeals in the second appeal sanctioned and affirmed the order of the District Judge which erroneously construed the above statute in two important questions,

(1) The lower court held that the above statute was not limited to a landlord's statutory lien but also included a landlord's contractual and matured lien.

(2) That the above statute did not "postpone" the statutory lien of a landlord, but reduced it to an unsecured claim.

Petitioner's contention is that Section 67(c) has no effect whatever upon a landlord's contractual seasoned lien and even as to the statutory lien of a landlord it is merely postponed and not reduced to an unsecured claim. Such decision of the Court of Appeals in the second appeal in sanctioning and affirming the order of the District Court construing Section 67(c), as aforesaid, is in conflict with

(a) Decision of this Court. *Goggin* vs. *Division of Labor of California,* 336 U. S. 118, 69 S. Ct. 469, 93 L. Ed. 543, Reversing 165 Fed. 2. 155 (CA 9).

(b) Decisions of other Circuits. *Ginsberg* vs. *Lindel,* 107 Fed. 2. 721 (CCA 8, Iowa) 1939; *Delaney* vs. *City and County of Denver,* 185 Fed. 2. 246 (CA 10, Colo.) 1950; *Cal. State Department of Employment* vs. *United States* (CA 9, Cal.), 1954, 210 Fed. 2. 242; *Britton* vs. *Western Iowa Co.,* 9 Fed. 2. 488, (CCA 8, Iowa) 1925, 45 A. L. R. 711 (note at 717); *In re Eakin Lumber Co., RFC* vs. *Sun Lumber Co.,* 126 Fed. 2. 731 (CCA 4) 1942, Affirming 39 Fed. Supp. 787; *City of New York* vs. *Hall,* 139 Fed. 2. 935 (CCA 2, N. Y.) 1944; *United States* vs. *Sands,* 174 Fed. 2. 384, (CA 2, N. Y.) 1949.

(c) Decisions of the Fifth Circuit. The *"INTRA-CIRCUIT CONFLICT"*[1] of decisions on Section 67(c), as well as the other two sections of the Chandler Act herein considered is not only pronounced but wholly irreconcilable. Consider the following cases: *Cutler-Hammer, Inc.* vs. *Wayne,* 101 Fed. 2. 823 (CCA 5, Ga.) 1939; *Commercial Credit Co.* vs. *Davidson,* 112 Fed. 2. 54 (CCA 5, Miss.) 1940; *City of New Orleans* vs. *Harrell,* 134 Fed. 2. 399 (CCA 5, La.) 1943; *City of Dallas* vs. *Crippen,* 171 Fed. 2. 526 (CA 5, Tex.) 1939; Reversing 78 Fed. Supp. 481; *Oppenheimer* vs. *Oldham,* 178 Fed. 2. 386 (CA 5, Tex.) 1949; *Seiden* vs. *Southland Chenilles', Inc.,* 195 Fed. 2. 899 (CA 5, Ga.) 1952;

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[1] This expression was used by this Court as adequate reasons for granting certiorari in the case of *Dickinson* vs. *Petroleum Conversion Corp.,* 338 U. S. 507, 70 S. Ct. 322, 94 L. Ed. 299, Reversing 173 Fed. 2. 738 (CA 2.). The expression, "Conflicting views within the Court of Appeals", was used as express justification for the granting of certiorari in *Maggio* vs. *Zeitz,* 333 U. S. 56, 68 S. Ct. 401, 92 L. Ed. 476, Reversing 157 Fed. 2. 951, (CCA 2). See also *John Hancock Ins. Co.* vs. *Bartels,* 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. 176, Affirming 100 Fed. 2. 813 (CCA 5). The above three cases were all bankruptcy cases.

Rochelle vs. *McLendon,* 208 Fed. 2. 442 (CA 5, Tex.) December 9, 1953.[1]

(D) It is to be observed that the Court of Appeals, even in the first decision (217 Fed. 2. 600) did not correctly construe and apply the above three provisions of the Chandler Act. This error, although committed against the City, did not result in any damage for the City was awarded

(a) $128,000 which more than absorbed the $100,000 paid by the City for all the physical assets of the bankrupt,

(b) Ownership of all the revenues from May 1, 1951, the date of the cancellation of the lease.

For the reason that this error did not result in any damage to the City no review was sought in this Court. The Court of Appeals on the second appeal sanctioned and affirmed the order of the District Court which reduced the City's claim to $128,000. Such action of the Court of Appeals gives the City the right to review the errors committed in the first appeal. *Reece* vs. *Georgia,* 350 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 109*, 24 L. W. 4025, Decided December 5, 1955. If the City does not have a right to correct such errors, the City will be satisfied to receive that which the Court of Appeals on the first appeal awarded it.

The decision of the Court of Appeals on the second appeal is grounded on the theory that a Bankruptcy Court can disturb vested, seasoned, unassailable contract liens. Such decision violates the express language of Sections 63, 64 and 67 of the Chandler Act, and if said sections be construed to authorize such destruction of vested contract liens then the City has been deprived of its property without Due Process of Law. This Court has held that the consti-

[1] See footnote[1], page 18, *supra,* for intracircuit conflict between the above *Rochelle* case and the later case of *Brans* vs. *City of Dallas,* 217 Fed. 2. 640.

tutional grant of power to Congress to enact bankruptcy law is subordinate to the Due Process of Law Clause of the Fifth Amendment. *Louisville Joint Stock Land Bank* vs. *Radford*, 1935, 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A. L. R. 1106, Reversing 74 Fed. 2. 576 (CCA 6); *Kuehner* vs. *Irving Trust Co.*, 299 U. S. 445, 57 S. Ct. 298, 81 L. Ed. 340, 1937, Affirming 85 Fed. 2. 35 (CCA 2.). The Court of Appeals for the Fifth Circuit in numerous cases which this Court has refused to review has held that encumbered assets of a bankrupt or proceeds derived from the sale of encumbered property cannot be charged even with administration expenses of the bankrupt. *In re Lake Nursery Co.*, a bankrupt, 119, Fed. 2. 535, Cert. Den. 314 U. S. 647, 62 S. Ct. 90 86 L. Ed. 519; *In re Brannon, City of Dallas* vs. *Ryan*, 62 Fed. 2. 959, Cert. Den. 289 U. S. 742, 53 S. Ct. 692, 77 L. Ed. 1489.

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Carl A. Hiaasen,
Counsel for Petitioner Broward National Bank Bldg., Fort Lauderdale, Florida.

Appendix A.

217 Fed. 2. 600.

IN THE

UNITED STATES COURT OF APPEALS,

FOR THE FIFTH CIRCUIT.

No. 14757.

CITY OF FORT LAUDERDALE,
Appellant and Cross-Appellee,

versus

D. D. FREEMAN, Trustee in Bankruptcy, *et al.*,
Appellees and Cross-Appellants.

(AND REVERSE TITLE.)

APPEAL AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(December 14, 1954.)

Before HOLMES, BORAH, and RUSSELL, Circuit Judges.

HOLMES, Circuit Judge: This is a bankruptcy case that was previously before this court on an appeal by the appellant, which was dismissed. 197 F. (2) 122. At

that time, appellant was seeking to gain possession of its real property, which had been retained in the debtor's possession and later was in the possession of the trustee. Shortly after the dismissal of that appeal, the bankruptcy court entered an order giving possession thereof to appellant. This appeal concerns rulings of the bankruptcy court disposing of appellant's claim for the proceeds of rentals collected by the trustee in bankruptcy.

The bankrupt was in possession of the property of appellant under a 20-year lease with a rental of $160,000 a year payable annually in advance. The rent was not paid when due on December 1, 1950, and appellant made written demand for payment. Notice under this demand expired on March 13, 1951. On May 1st the City Commission adopted a motion to cancel the lease; another such resolution was adopted June 19, 1951, and notice thereof served on the bankrupt the following day. There appears to be no question but that the lease was effectively cancelled, and that the trustee in bankruptcy did not attempt to adopt it. The final order of the bankruptcy court allowed appellant $40,000 as a secured claim, representing rent due for the three months immediately preceding the time of bankruptcy, and $88,000 as an administrative expense for the period that the property was continued in the possession of the debtor and held by the trustee. Appellant insists that it was entitled to full rent for the years 1951 and 1952, less the amount of rent received by it during the latter half of 1952. It also contends that under applicable Florida statutes it is entitled to have this amount doubled.

We do not reach for decision the last two contentions, because the appellant has no lien or priority for unearned or future rent and there is no money or asset in the bankrupt's estate from which to pay or to enforce payment of general claims of this character. The appellant does have a lien, however, for three months' back rent, and the item of $40,000 for such rent was properly allowed; also the item of $88,000 for rent due by the trustee for occupancy of the premises of the bankrupt was an actual and necessary

expense of preserving the estate subsequent to filing the petition, as well as an expense of administration, and was a claim entitled to priority in the first order of payment, which was properly allowed. Section 64(a)(1) of the bankruptcy act, 11 U. S. C., Sec. 104(a)(1). We further agree with the appellant that, in so far as the revenues derived from the leased premises were concerned, the same could not be charged with general administration expenses because the city had a lien thereon, unless it was the owner thereof (which we are holding that it was), in which case the lien was merged in the title of the owner.

The gist of this case is that there were no general assets of the bankrupt out of which to pay the expenses of administration, and it was reversible error for the court below to distribute the revenues derived from the operation of the leased premises as unencumbered general assets of the bankrupt. All of the physical assets of the debtor were sold to appellant at a private sale for $100,000. This amount, plus a few other comparatively small items, and the rentals collected by the trustee, constituted nearly all of the bankrupt's alleged assets.

We agree with the appellant that it was entitled to the rents collected by the trustee from the sub-tenants of the bankrupt during the administration of the bankrupt's estate, since the lease was cancelled and the trustee did not adopt it. It was also reversible error to allow the trustee to collect enough rent from appellant's property to finance the administration of the bankrupt's estate. The rents and profits received by the trustee from the sub-tenants accrued to the benefit of the owner, and were held by the trustee in trust for the benefit of appellant.

The appellant is entitled to the above-mentioned items, collected by the trustee from the sub-tenants, in addition to the sum of $40,000 allowed it by the court below for three months' rent prior to bankruptcy, and $88,000 allowed it for use and occupancy of the premises by the trustee after bankruptcy. The judgment appealed from is reversed on direct appeal, affirmed on cross-appeal, and remanded

to the district court for an accounting by the trustee to the appellant for the items of rent wrongfully collected from the sub-tenants

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A True copy:

Teste:

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Clerk of the United States Court of Appeals for the Fifth Circuit.

Appendix B.

(Filed September 7, 1955)

(R. 15,845, page 86)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF FLORIDA.

MIAMI DIVISION.

No. 2537-M-Bankruptcy.

IN THE MATTER

of

BAHIA-MAR CORPORATION,
Bankrupt.

Order on Certificate of Review Filed July 5, 1955.

This cause coming on to be heard after due notice upon the petitions for review filed by D. D. Freeman, Trustee, and the City of Ft. Lauderdale, of the referee's order dated June 13, 1955, and the Court having heard argument of counsel and being fully advised in the premises, is of the opinion that the first determination in reviewing these proceedings must be made with reference to the manner of treating and the priorities of two items: the first being the amount of $88,000.00 determined by this Court and the Court of Appeals, as a proper amount for the use and occupation of the *entire* premises (as originally leased in the 20 year lease in question) for the period subsequent to the expiration date of the demand for payment of rent (March 14, 1951, to June 14, 1952), and the second item

being the amounts of $63,373.90 and $14,510.34, which amounts represent the total payments as "rent" and profits, respectively, collected by the Trustee from the "sub-tenants" during the period for which the $88,000.00 amount was determined to be reasonable compensation for the use and occupation allowance.

As admitted in open Court by all parties, the $88,000.00 item was for the use and occupation of the *entire* premises, including those parts occupied by the "sub-tenants" from whom the $63,373.90 and the $14,510.34 was collected. No question exists as to the item of $40,000.00 due the City for rent due prior to March 14, 1951, for which the City had a lien on the Bankrupt's chattels.

Turning first to the amounts of $63,373.90 and $14,510.34 collected by the Trustee from the "sub-tenants", the Court is bound by the decision rendered by the Fifth Circuit Court of Appeals when this case last visited that Court. *Ft. Lauderdale* v. *Freeman*, 217 F. 2d 600 (5th Cir. 1954). Therein the Circuit Court held that "The rents and profits received by the trustee from the subtenants accrued to the benefit of the owner, and were held by the trustee in trust for the benefit of appellant." This Court has also noted the cases of: *Central Manhattan Properties* v. *D. A. Schulte*, 91 F. 2d 728 (2d Cir. 1938); *In re Bromel-Knapp Corp.*, 106 F. Supp. 519 (E. D. Mich. 1952); and *In re United Cigar Stores Co. of America*, 69 2d 513 (2d Cir. 1934).

We now turn to the $88,000.00 amount determined to be a reasonable amount for use and occupation. The Court holds that the payment of the amounts of $63,373.90 and $14,510.34, upon which a trust has been impressed for the benefit of the City, should be credited toward payment of the $88,000.00 amount. The City is not entitled to the "rents and profits" and, in addition, to the use and occupation charge, for either of two reasons:

(1) It would be inequitable to impose a double charge, namely, the use and occupation charge and in addition to require the Bankrupt at the same time to pay the amounts

collected from the "sub-tenants" who occupied parts of the premises for which the use and occupation sum covered.

(2) Under the law of Florida, there is *no* lien for use and occupation (as distinguished from the lien given from an existing rental agreement under Section 83.08 of Florida Statutes), (see also *Waldo* v. *United States Ramie Corp.*, 74 So. 2d 106 (Fla. 1954), wherein the Court stated, at 108: "The relationship of Apopka and U. S. Ramie as landlord and tenant was vital to its claim of a landlord's lien for rent . . .") and, therefore, any balance of the $88,000.00, after deducting the amounts collected from the "sub-tenants", is governed by the priority section of the Bankruptcy Act and comes under the category of "expenses of administration." 11 U. S. C. A. §104 (a) (1).

In the case of *Central Manhattan Properties* v. *Schulte*, 91 F. 2d 728 (2nd Cir. 1937), the lessor filed a claim in a reorganization proceeding for the sub-rents collected by the lessee-debtor, which rents were collected at a time when the debtor had not affirmed or rejected th head leas, and which debtor had defaulted upon the payment of its rent. In impressing a trust for the sub-rents collected for the period after the filing of the voluntary petition until the end of that month, the Court stated at page 729:

> "Since the loss imposed upon the lessor is too obvious for debate, it follows that the debtor has been unjustly enriched at the expense of the lessor. It would be contrary to every principle of equity if the property so withheld should not be subjected to a *constructive trust* in favor of the lessee [sic]. . . . It is to be observed, however, that the trust *res* is not the sub-rents themselves, on which by hypothesis the lessor has no claim, but the premises. For this reason it might theoretically have been possible to charge the debtor with their value—though that is not the law—and such a liability would be for damages. Quite independent and in addition to it is the duty of all trustees to restore any gain or profit they may have made out of the *res;* that is fundamental to the relation in all its forms. The sub-rents, though

> they were payable in advance, were not on that account any less a profit derived by the debtor from its retention of the premises during the month of June; that profit belongs to the lessor at whose expense it was procured; it is recoverable in *equity.*

The Court, therefore, holds that the priority of payments to creditors, secured and unsecured, shall be as follows:

(1) $40,000.00 to the City of Ft. Lauderdale "for three months' rent prior to bankruptcy," for which the City has a lien. *Ft. Lauderdale* v. *Freeman,* 217 F. 2d 600, 602 (5th Cir. 1954). (The Court of Appeals stated at page 602: "The appellant does have a lien, however, for three months' back rent, and the item of $40,000.00 for such rent was properly allowed.") See Fla. Stat. §83.08.

(2) (a) $63,373.90 to the City of Ft. Lauderdale which amount was collected as "rent" from the "sub-tenants" by the Trustee and upon which a trust was impressed by law, and

(b) $14,510.34 to the City of Ft. Lauderdale for profits derived from the operation of the estate upon which a trust was impressed by law. *Ft. Lauderdale* v. *Freeman,* 217 F. 2d 600 (5th Cir. 1954). (The Court of Appeals stated at page 602: "The rents and profits received by the trustee from the subtenants accrued to the benefit of the owner, and were held by the trustee in trust for the benefit of the appellant [City of Ft. Lauderdale].")

(3) The debts which have priority by virtue of 11 U. S. C. A. §104 (a), which debts are on an equal footing in priority, namely:

(a) $10,115.76 to the City of Ft. Lauderdale, which amount represents the difference between the $88,000.00 for use and occupation, and the already secured amounts of $63,373.90 plus $14,510.34 (set forth in category (2) above) (The use and occupation charge comes within the priority under §104 (a) (1) termed: "the costs and expenses

of administration." 3 *Remington on Bankruptcy* §1210, p. 103 (1954 Supp.), and the cases cited therein).

(b) $1,611.25 to the City of Ft. Lauderdale for costs on the second appeal.

(c) $1,311.34 to Joseph E. Phillips for auditing expenses.

(d) $578.14 to T. F. Fleming, Trustee's attorney, for expenses advanced.

(e) $2,500.00 to T. F. Fleming, Trustee's attorney, for legal services rendered since December 16, 1952.

(4) All other unsecured provable claims if there be sufficient assets of the bankrupt's estate with which to pay such claims.

It is, therefore, ORDERED AND ADJUDGED that the Referee shall cause the entire estate of Bahia-Mar Corporation, Bankrupt, including the refund owed by the Trustee in the amount of $1,006.04, and the chose in action, *Freeman* v. *Indemnity Ins. Co. of North America and Standard Accident Ins. Co.*, No. 5943-M-Civil, being a claim by the Trustee now pending in this Court in the amount of $10,731.54, to be collected, reduced to money and distributed in accordance with the order of preference set forth above, and thereupon to close the estate after approving the final accounts, discharging the Trustee, and either discharging or refusing to discharge the bankrupt corporation; and it is

FURTHER ORDERED AND ADJUDGED that the sum of $116,219.38 be applied to the claims of the City of Ft. Lauderdale, secured and unsecured, which sum represents the agreed valuation of the assets taken over by the City from the bankrupt; and it is

FURTHER ORDERED AND ADJUDGED that the Referee's order of June 13, 1955, except as herein specifically modified and reversed, is in all other respects approved.

DONE AND ORDERED in Chambers at Miami, Florida, this the 1st day of September 1955.

EMETT C. CHOATE,
United States District Judge.

Appendix C.

Portions of Section 63 of the Chandler Act (11 U. S. C. 103):

"Debts Which May be Proved.—a Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) an open account, or a contract express or implied; * * * (9) claims for anticipatory breach of contracts, executory in whole or in part, including unexpired leases of real or personal property; Provided, however, That the claim of a landlord for damages for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall in no event be allowed in an amount exceeding the rent reserved by the lease, without acceleration, for the year next succeeding the date of the surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after bankruptcy, plus an amount equal to the unpaid rent accrued, without acceleration, up to such date: And provided further, That in the case of an assignment of any such claim for damages, the court shall, in determining the amount thereof, examine the circumstances of the assignment and the consideration paid or to be paid therefor, and may allow the claim of the assignee in such amount, subject to the provisions of the foregoing proviso of this clause (9), as will be fair and equitable."

Portions of Section 64 of the Chandler Act (11 U. S. C. 104):

"Debts Which Have Priority.—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be * * * (5) debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority by applicable State law: Provided, however, That such priority for rent to a landlord shall be restricted to the rent which is legally due and owing for the actual use and occupancy of the premises affected, and which accrued within three months before the date of bankruptcy."

Portions of Section 67 of the Chandler Act (11 U. S. C. 107):

"Liens and Fraudulent Transfers.—* * * *

"c. Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this Act, though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act."

FILED
JUL 13 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 161

CITY OF FORT LAUDERDALE,

Petitioner,

vs.

D. D. FREEMAN, as Trustee in Bankruptcy for Bahia Mar Corporation, a Florida corporation, Bankrupt,

Respondent.

In the Matter of Bahia Mar Corporation, Bankrupt

BRIEF OF RESPONDENT, D. D. FREEMAN, AS TRUSTEE FOR BAHIA MAR CORPORATION, BANKRUPT

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BRIEF OF RESPONDENT, D. D. FREEMAN, AS TRUSTEE FOR BAHIA MAR CORPORATION, BANKRUPT

PREFACE

The Petitioner herein will be referred to as the "City," and the Respondent as "Trustee." Unless otherwise indicated, all emphasis is supplied by the brief writers.

CITATIONS TO OPINIONS BELOW

The City has appealed four times to the Court of Appeals, but it discusses only two of these four decisions:

1. The City's first appeal, Case No. 13,927, referred to herein as the first appeal, is reported in **197 F. 2d 122;** (not discussed by the City; copy attached, Appendix A).

2. The City's second appeal, Case No. 14,757, referred to herein as the second appeal, is reported in **217 F. 2d 600.**

3. The City's third appeal, Case No. 15,792, referred to herein as the third appeal, is reported in **226 F. 2d 223;** (not discussed by the City; copy attached, Appendix B).

4. The City's fourth appeal, Case No. 15,845, referred to herein as the fourth appeal, is reported in **230 F. 2d 948.**

It should be noted that the City erroneously refers to its second appeal as its "first appeal" and, likewise, to its fourth appeal as its "second appeal."

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

FIRST QUESTION

There has been no violation of the doctrine of "res judicata" or "Law of the Case". The District Judge had to interpret and apply the decision of the Court of Appeals on the second appeal to the facts of this case. The Court of Appeals held he did so properly, **230 F. 2d 948.**

Both the mandate and opinion were very clear and definite in the directions to the District Court on the second appeal:

> "... remanded to the district court for an accounting by the trustee to the appellant for the items of rent wrongfully collected from the sub-tenants." (**217 F. 2d 602**; Mandate, R. 15,845, pp. 27, 29.)

It must be regarded then that **the sole ground for reversal was to require an accounting by the Trustee to the City for the rents wrongfully collected from the sub-tenants.** It necessarily follows that after such an accounting, the District Judge then had to enter a proper order of distribution. This he did (R. 15,845, pp. 86-92).

The Court of Appeals must have intended for the District Judge, as the trial court, to exercise some judicial discretion in making a proper interpretation of its opinion on the second appeal. This is shown by the denial of the City's petition for writ of mandamus without prejudice to its right of appeal, **226 F. 2d 223.** (Copy attached Appendix B).

Immediately following the second appeal, the Trustee made the accounting as ordered (R. 15,845, pp. 8-13). This accounting was prepared by Joseph E. Phillips, Certified Public Accountant, who also is auditor for the City. It confirmed the accuracy of the Trustee's Final Report filed on November 10, 1952 (R. 14,757, p. 270).

There is no question but that $88,000 is a more than reasonable return for the City. On March 26, 1953, Mr. Kimpel, the City's manager of the yacht basin, estimated that the City would make a net profit of **$85,000 before depreciation on the City's operation the year following the Trustee's operation** (R. 14,757, p. 484). Such was the evidence before the Referee on June 4, 1953, when he ordered the Trustee to pay rent in the sum of $88,000 to the City (R. 14,757, p. 508).

There is no suggestion in the opinion on the second

appeal that the Trustee should be required to pay double rent to the City for the use and occupancy of the property. The City cites no authorities for such a proposition and we know of none.

The City must realize that it is absurd to say that when a Court-appointed Trustee is directed to operate a business, that he should be required not only to pay over all of the rents and profits from the business to the landlord, but in addition thereto, pay the landlord a rental **for the privilege of operating the business. This could only result in the Trustee being surcharged for the amount of rent ordered to be paid to the landlord.** If that is the law, then no one would dare assume the risk of being appointed to operate a business as a trustee under order of the bankruptcy court.

It is inconceivable that such a result was intended. **It could only mean that the City was to have one or the other, but not both.** The District Judge solved this dilemma by allowing the City the full sum of $88,000 for use and occupancy as ordered by the Court of Appeals on the one hand, and on the other hand, by allowing the Trustee a credit against this sum in the amount of $77,884.24 representing all of the rents and profits derived from the property during the Trustee's administration.

This means that the difference between these two figures, i.e., $10,115.76 must be paid by the Trustee from the general assets of the bankrupt's estate to the City for the privilege of operating the yacht basin for the City!

On the second appeal, Judge Holmes said:

> "The gist of this case is that there were no general assets of the bankrupt out of which to pay the expenses of administration . . ." **(217 F. 2d 600, 602.)**

It is hard to understand how Judge Holmes could say

this since the accounting made by the Trustee following that appeal (R. 15,845, pp. 8-13) shows that the general assets of the bankrupt totaled $141,274.53:

Assets sold to the City by private sale	$116,219.38
Other assets received from the bankrupt	25,055.15
Total general assets	$141,274.53

The entire sum of $141,274.53 is available to pay administration expenses. In addition to this, the Trustee earned profits of $77,884.24 which were not charged with any bankruptcy administration expenses whatsoever.

The Trustee's operation of the yacht basin was approved on both the first and second appeals. The entire point before the Court on the first appeal was the City's claim that the District Judge erred in authorizing the Trustee to conduct the business of the bankrupt until further order of the Court, claiming that since the lease had been canceled, the Trustee had no right to withhold possession of the bankrupt's property from the City, because the City was the owner of the property (which is essentially the City's same contention now). In disposing of the City's claim, the Court said:

> "Here instead of proceeding with a hearing on its petition by offering evidence, as requested by the referee and suggested by the judge, and thus bringing the matter to a head, the City instituted and pressed a fruitless appeal from an order which determined nothing whatever and put no obstacle of any kind in the way of its obtaining the relief it desired. By doing this, the City has not only added delay to delay but, bringing up an enormous record, has cumulated costs on costs, . . .
>
> "The appeal is dismissed with costs of appeal taxed against the appellant." (**197 F. 2d 122, 124**; copy attached, Appendix A.)

The City really complains of only one thing—that the Referee and District Judge have refused to require the Trustee to serve without compensation or pay out of his own pocket many thousands of dollars to the City.

This is made abundantly clear when we consider that, following the second appeal, **the Referee awarded to the City every dollar of the assets and funds in the possession of the Trustee, save only the expenses of his administration.** Still, the City appealed and the Trustee's appeal followed thereafter (R. 15,845, pp. 61-65, 76).

On review, the District Judge took back some $50,000 which the Referee had awarded to the City, holding instead that it should be paid to the common creditors whose claims total approximately $100,000 (R. 15,845, pp. 86-92).

The District Judge entered the proper order; it should not be disturbed.

SECOND QUESTION

The City studiously avoids spelling out just what the conflicts are that it complains of under Sections 63, 64 and 67 of the Chandler Act of 1938. If the City has any misgivings about the interpretation given to these sections on the second appeal, under the doctrine of "Law of the Case" such interpretations are now res judicata, having been settled on the second appeal along with several other questions which were affirmed without comment.

The Referee's order of June 4, 1953 makes it clear that $40,000 was awarded to the City for 3 months' rent accrued before bankruptcy in accordance with Section 67(c), (R. 14,757, pp. 508-511).

The best reply to the City's various contentions is the

concise statement in Rochelle v. McLendon, **208 F. 2d 442, 443:**

> "Section 67, sub. c of the Act of 1938 provides that statutory liens on personal property not accompanied by possession, and liens whether statutory or not of distress for rent, shall be restricted in the amount of their payment to the same extent as is provided for wages and rent, respectively, in sub-section a of Section 64 of said Act. **The plain meaning of this is that, where the landlord has not taken possession of the goods and chattels of the bankrupt at the time of bankruptcy, he shall be paid as a lien creditor only to the extent of the rent accrued and unpaid within three months prior to bankruptcy. The language of the statute and the Congressional reports thereon make clear that this was the legislative intent.**" (numerous citations omitted).

The City contends that this case conflicts with the later case of Brans v. City of Dallas, **217 F. 2d 640**, but this is not so. The Brans case involves a tax lien and not a landlord's lien for rent, and the Chandler Act is not discussed at all.

Tax liens, like liens for rent, come under Section 67(c):

> "It is well settled that claims for taxes secured by valid liens, like other valid liens, must be satisfied out of the bankrupt's estate before any distribution at all begins under Section 64, **subject, however, to an express statutory exception inserted by the 1938 Act in Section 67, sub. c, which provides for postponement in payment of tax liens in certain circumstances.**" City of Dallas v. Crippen, **171 F. 2d 526, 529.**

However, tax liens and liens for rent, although they both are governed by Section 67(c), are treated differently. The City does not include Section 64(a) (4) in its appendix; this section clearly shows that tax liens are merely "post-

poned", while the landlord's lien for rent is both "postponed" and "restricted" under Section 64(a) (5).

In making changes in 1952 to Section 67(c), the House Report contained an explanation of the changes which leaves no doubt as to the purpose of the section itself:

> "° ° ° the principal change is designed more fully to implement the policy of the Chandler Act, and to clarify one point which may otherwise be the cause of troublesome litigation. **The Chandler Act introduced section 67c as a new subdivision.** In limiting statutory liens on personal property not accompanied by possession of such property, it met the situation presented by a growing tendency to express priorities in terms of liens and thus to defeat the scheme of priorities prescribed in section 64a of the Bankruptcy Act. A lien upon real estate is commonly dealt with adequately by recording acts and there is no confusion caused by fluctuation of the subject matter to which it relates. Liens on personal property unaccompanied by possession, however, are of the nature of 'floating liens', which attach to all a debtor's personalty, although the property he owns is commonly changing from day to day. If any provisions for priority were relabeled a 'lien', such a lien would be indistinguishable from floating liens on personal property.
>
> **"There is accordingly reason to restrict such liens to the same extent that priorities are restricted. The Chandler Act also adopted the view that a landlord should not be encouraged to accumulate liens of indefinite extent and thus contribute to building up unsound financial positions on the part of tenants to the disadvantage of general creditors.** Section 67c accordingly postponed such liens to administrative expenses and to wages, which to the extent of $600 earned within 3 months of the bankruptcy were for the first time given by section 64a priority second only to expenses of administration and outranking all other

priority claims, including taxes, which were assigned to the fourth degree of priority.

"Wages having thus been given prescribed priority under section 64a, section 67c then proceeded to restrict the recognition of liens for wages on personal property unaccompanied by possession to the same extent that their priority was restricted. **Landlords' liens were likewise restricted.**" House Report No. 2320 to S.2234, 82d Cong., 2d Sess. (1952) 13, found in 1952 Collier Pamphlet Edition Bankruptcy Act, page 112.5; and also 1952 Cumulative Supplement, Collier Bankruptcy Manual, § 67,App., pages 230, 231. (To the same effect, see Senate Report No. 1395 on S.2234, 82d Cong., 2d Sess. (1952) 7).

The City's alleged conflicts are vaporous and without substance.

CONCLUSION

Some lawyers are capable of "making a mountain out of a molehill". Judge Hutcheson recognized this trait on the City's first appeal when he said:

> "Appellant, with a display of learning and a wealth of citation deserving of a better and stronger cause, attacks Appellee's claim, . . ."

The common creditors should be paid something on their claims of approximately $100,000. The decision of the District Judge, affirmed by the Court of Appeals, is correct and should not be disturbed.

Respectfully submitted,

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By_____
John W. Fleming

Appendix A

197 F. 2d 122

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13927

CITY OF FORT LAUDERDALE,
Appellant,

versus

D. D. FREEMAN, TRUSTEE IN BANKRUPTCY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(May 10, 1952.)

Before HUTCHESON, Chief Judge, and BORAH and RUSSELL, Circuit Judges.

HUTCHESON, Chief Judge: Aggrieved at an order[1] of the district judge, which had affirmed the order of the

[1] The order in addition to providing that the order of the referee is hereby affirmed, further declared:

"Inasmuch as this affirmance leaves the Trustee in possession of a large part of the leased premises, and the Court being of the opinion that there should be a termination of this possession at the earliest practical date under all the circumstances, and being of the opinion that the rent to be paid the landlord for that portion of the premises retained should be predicated insofar as possible upon the rental fixed in the original lease, the Court makes these comments for the guidance of the Referee in the further administration of this estate:

"The referee should direct that the issues be made up and evidence adduced without any undue delay so that the case now in bankruptcy may be concluded before Sept. 1, 1952, so that the entire property may

referee deferring action on the city's petition and continuing the trustee in possession, the City, appealing on a statement of points and a limited record, is here insisting that the order appealed from was erroneously entered and must be reversed.

The trustee, pointing out that orders of referee and judge were not final but interlocutory, indeed were not in a legal sense dispositive, insists: (1) that the referee's order[2] was not reviewable[3] by the judge; and (2) that the judge's order was not appealable.

In addition, insisting that the appeal should be dismissed as moot, it attaches to its motion an order[4] of the referee dated Feb. 29, 1952, ordering the trustee to liquidate the assets of the bankrupt and to abandon and vacate the premises occupied by him.

In support of its second point, appellee, pointing to the nature of the relief sought by appellant and canvassing the cases dealing with the distinction between a proceeding in bankruptcy and a controversy arising in a

---

be restored to the City before the next winter season. The Referee, in fixing the reasonable rental for the portion of the premises retained by the Trustee, should base such reasonable rental in light of the rental provided for in the original lease, so that the general creditors will not profit to the detriment of the landlord."

[2] This order, canvassing the city's petition, reciting that no testimony had been offered by the city and that "there is nothing else this court can do but continue these matters until evidence is submitted", went on to provide:

"It is ordered° °that the issues made by the pleadings in this cause be continued subject to such to such testimony as the parties desire to introduce" and "further° °that the trustee be° °authorized to conduct the business of the bankrupt until further order of this court."

[3] Citing: In Re: Prindidle, 115 F(2) 21; 8 C. J. S., Sec. 276(d), p. 990; 11 USCA, Sec. 67(c) p. 239, note 44; 6 Am. Jur. Sec. 1716, p. 1528; In Re: Shimmell, 203 Fed. 181; In Re: Grabozes, 228 Fed. 574.

[4] This order entered on the petition of the trustee provided that he should "proceed promptly:

"(1) To liquidate all the assets of said bankrupt.

(2) To make a full and final accounting of his acts and doings as said Trustee and pay unto the Treasury of the Court any and all sums of money on hand to be disposed of by order of this court.

(3) That on or before June 30, 1952, said Trustee shall abandon and vacate the premises occupied by him as such Trustee."

proceeding in bankruptcy,[5] and to the rule that appeals from interlocutory orders in bankruptcy which are trivial in their effect on the proceedings may be refused,[6] relies strongly on our case of Universal Oil Producers v. Cosden, 178 F(2) 495, construing 11 USCA, Sec. 47.

Appellant, with a display of learning and a wealth of citation deserving of a better and stronger cause, attacks appellee's claim, that the order appealed from was entered in a controversy arising in a proceeding in bankruptcy.

Insisting that it was entered in a proceeding in bankruptcy and marshalling its cases in support, it urges upon us, in addition, that if this is not so, this court would still have jurisdiction under Sec. 1292(1), Title 28, because the appeal was in part from an order refusing to dissolve or modify an injunction.

We cannot agree with either of these propositions. Upon the first, the authorities settle it, we think, that this was a conroversy, and a very considerable one, arising in a proceeding in bankrupcy. Upon its alternative proposition that the appeal should be entertained because it was in part from an order refusing to dissolve an injunction, the record does not support appellant. The statement of points made in connection with appellant's limited appeal shows that no appeal was taken from, no complaint made of, the order to the extent that it might be considered as refusing to dissolve the injunction. In addition, it is perfectly clear that no order refusing to dissolve the injunction was made. There was only a deferment to another day of a hearing on the matter.

Agreeing with appellee throughout, we are in no

[5] 11 USCA Sec. 47(a), as amended, note 40; Universal Oil Pro. Co. v. Cosden, 178 F(2) 495; Petersen v. Sampsel, 170 Fed(2) 555.
[6] In Re: Leigh, 139 F(2) 386; Federal Land Bank v. Hansen, 113 F(2) 82; Cf. In Re: Woodruff, 129 F(2) 152; Goldie v. Carr, 116 F(2) 335.

doubt that the orders entered by the referee and judge were interlocutory, and that the petition to review the order of the referee and the appeal from the order of the judge were improvidently taken. Neither are we in any doubt that the appeal from the district judge's order should be dismissed. Even if the order be regardd as one entered in a proceeding in bankruptcy rather than in a controversy arising therein, it is a wise and salutary rule that appeals from interlocutory orders in bankruptcy, which, as this one is, are trivial in their effect on the proceedings may be refused, and that interlocutory orders in bankruptcy proceedings, which are dispositive of nothing, are not reviewable, and appeals therefrom should be dismissed.

This case forcefully illustrates the wisdom of that rule. Here, instead of proceeding with a hearing on its petition by offering evidence, as requested by the referee and suggested by the judge, and thus bringing the matter to a head, the City instituted and pressed a fruitless appeal from an order which determined nothing whatever and put no obstacle of any kind in the way of its obtaining the relief it desired. By doing this, the city has not only added delay to delay but, bringing up an enormous record, has cumulated costs on costs, when all that it needed to do, was to offer to proceed with the hearing before the referee by offering such proof as it was able to muster, and, if the referee did not then proceed, to apply to the judge for an order compelling him to do so.

The appeal is dismissed with costs of appeal taxed against appellant.

Appendix B

226 F. 2d 223

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 15792

IN RE:

CITY OF FORT LAUDERDALE, FLORIDA,
PRAYING FOR A WRIT OF MANDAMUS

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(September 28, 1955.)

Before HUTCHESON, Chief Judge, and BORAH and RIVES, Circuit Judges.

BY THE COURT:—

UPON CONSIDERATION of Petitioner's Motion for leave to fie a petition for a writ of mandamus in the above cause,

IT IS ORDERED, that leave to file the petition for a writ of nandamus is denied;

IT IS FURTHER ORDERED that the denial of this motion shall be without prejudice to Petitioner's right of appeal.

— — — —